IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

Ashley Reeves as Personal Representative of the Estate of Albert Carl "Bert" Reeves,	)	Case No. 2:12-cv-02765-DCN
Plaintiff,	)	
v.	)	**REPLY IN RESPONSE TO DEFENDANTS' OPPOSITION TO SANCTIONS FOR VIOLATION OF FED. R. CIV. P. 11(b)**
The Town of Cottageville, The Town of Cottageville Police Department and Randall Price, individually,	)	
Defendants.	)	

The Plaintiff Ashley Reeves, as personal representative of the estate of Albert Carl "Bert" Reeves, by and through her undersigned counsel, respectfully submits this instant reply to Defendants' September 2, 2014 Memorandum in Opposition (ECF Entry No. 135) to Plaintiff's Motion for Sanctions initially filed on August 13, 2014. Plaintiff further supports her motion and incorporates by reference the Plaintiff's Memorandum in Opposition to Defendants' Joint Motion to Disqualify Plaintiff's Counsel (ECF Entry No. 118), the official transcript of the hearing before this Honorable Court on August 20, 2014 (ECF Entry No. 133), the Order Denying Defendants' Joint Motion to Disqualify Plaintiff's Counsel (ECF Entry No. 109), and the Affidavit of Professor John Freeman (Exhibit A).

Pursuant to Federal Rule of Civil Procedure 11(c), the Plaintiff has moved this Honorable Court to impose sanctions against Defendants' counsel and their respective law firms for violation of Fed. R. Civ. P. 11(b). Defendants' counsel violated the federal rule when they filed Defendants'

Joint Motion to Disqualify the Plaintiff's Counsel and his Law Firm from Further Representation of the Plaintiff in the Instant Matter (ECF Entry No. 109), presenting the motion to the Court without evidentiary support for their factual contentions and instead frivolously making the motion for the improper purposes of causing unnecessary delay in the lawsuit, needlessly increasing the cost of litigation, and harassing the Plaintiff.

The August 20, 2014 Hearing

On August 20, 2014, the parties, by and through their counsel, presented oral arguments to this Honorable Court in response to Defendants' Joint Motion to Disqualify the Plaintiff's Counsel and his Law Firm from Further Representation of the Plaintiff in the Instant Matter (ECF Entry No. 109). At the outset, the Court denied Defendant Randall Price's Motion to Disqualify. Specifically, the Court ruled that because Plaintiff's Counsel had never represented Defendant Randall Price, Defendant Price lacked standing under Rule 1.6 and 1.9 to assert a claim of conflict of interest between counsel's former and current representations. (Transcript of Oral Argument at page 2, lines 5-9). Notwithstanding the above, the Court allowed Defendant Price's Counsel, Lake Summers, to present the arguments made in the Defendants' Joint Motion to Disqualify the Plaintiff's Counsel on behalf of the Town of Cottageville.

Defendants' improper use of the Model Rules of Professional Conduct as a tactical adversarial weapon was exposed by their attorneys' own statements at the August 20, 2014 hearing. During the oral arguments, Defendants admitted the only evidence of an "apparent conflict" was a one-hour billing statement by one of Mr. McLeod's associates from his prior law firm. (Transcript of Oral Argument at page 5, lines 21-25). Mr. Summers acknowledged that Defendants had no knowledge that the Town of Cottageville received any legal advice regarding police procedures from Mr. McLeod. (Transcript of Oral Argument at page 9, line 1).

Additionally, Defense Counsel authored numerous pages in Defendants' Joint Motion to Disqualify the Plaintiff's Counsel devoted to propounding that Plaintiff's Counsel utilized confidential information from his previous representation of the Town of Cottageville in the depositions of witnesses Paul Haase and Margaret Steen, yet at the hearing admitted that "any competent attorney" would have asked the very "same questions". (Transcript of Oral Argument at page 11, lines 13-16). Conflicting with their previous proposition in their lengthy brief, Defense Counsel confessed at the hearing that they were unaware of the existence of any confidential records that Mr. McLeod could have been privy to in the event that he represented the Town of Cottageville in the Modica case[1]. (Transcript of Oral Argument at page 10, lines 11-14). Moreover, at the hearing on the motion to disqualify, Defense counsel offered no response to the plain fact that the Town of Cottageville is a public entity.

Defense Counsel acknowledged they understood the Motion to Disqualify Plaintiff's Counsel to be "serious" and "extraordinary". (Transcript of Oral Argument at page 14, line 18-20). Defense Counsel admitted that although they had knowledge of the alleged conflict three (3) weeks in advance of jury selection, they purposely waited until ten (10) days before a date certain trial to file the motion. (Transcript of Oral Argument at page 15, line 2-4). Defendants were well aware that Fed. R. Civ. P. 6(c) requires, with limited and inapplicable exceptions, that a written motion be served at least fourteen (14) days prior to a hearing on the motion and that the Court would provide Plaintiff time to respond to the motion, thereby postponing the trial date and requiring the parties to undergo jury selection for a second time. In fact, Defendants' counsel

[1] To the contrary, the Court ruled that there was "no evidence that Mr. McLeod or his former law firm ever represented Cottageville in the Modica matter. As noted above, defendants have not demonstrated that Mr. McLeod or his former law firm ever counseled, represented, or advised Cottageville with regards to the Modica shooting. As a result, there can be no conflict of interest." (Order Filed August 26, 2014, at 9, ECF. Entry No. 129)

confessed that they "hoped" the Motion to Disqualify the Plaintiff's Counsel would "put the brakes on trial." (Transcript of Oral Argument at page 33, lines 2-7). As such, it is abundantly clear Defendants' counsel strategically waited until after the parties had incurred the time and expense of impaneling the jury on July 9, 2014 and allowed jury selection to occur knowing that it was futile and would have to be repeated due to the filing of the instant motion. Based on Defense counsel's actions, it is apparent that the disqualification motion had less to do with the Model Rules of Civil Procedure and more to do with concern by the defense over the makeup of the jury selected and sworn in on July 9, 2014.

As such, by Defense counsel's own statements at the August 20, 2014, it is undisputed the Defendants had no evidence supporting a conflict of interest when filing the Motion to Disqualify Plaintiff's Counsel; that Defense counsel was aware of the perceived conflict at the latest by June 16, 2014, over three (3) weeks before the jury was selected and seated; that Defense counsel strategically waited until the tenth (10^{th}) day before a date certain trial to file the Motion to Disqualify; and "hoped" that by filing the Motion to Disqualify, the trial would be delayed.

This Honorable Court should impose Sanctions to Deter Defendants' Counsel from Engaging in Improper Litigation Abuse.

Defendants' filing of the Motion to Disqualify Plaintiff's Counsel violated the Federal Rules of Civil Procedure, as they misrepresented to the Court in filing the motion that to the best of the attorneys' "knowledge, information, and belief, formed after an inquiry reasonable under the circumstances" that:

> (1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;
>
> (2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;

> (3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and
>
> (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.

Fed. R. Civ. P. 11(b). As shown above, Defendants' counsel moved to disqualify Plaintiff's counsel without any evidentiary support for their factual contentions. In fact, this Court labeled their charges as "speculative" and "specious." (Order Filed August 26, 2014, at 10, ECF. Entry No. 129). Moreover, while Plaintiff asserts that the Town of Cottageville would have been aware of Plaintiff's counsel's former legal representation of Town at its inception, it is undisputed that Defense counsel was made aware of the prior representation in June of 2014. Despite this notice, Defense counsel proceeded with multiple depositions and most importantly jury selection, which deliberately "wasted the parties' time and money, frittered away precious judicial resources, and needlessly delayed trial." (Order Filed August 26, 2014, at 6, ECF Entry No. 129).

It is further undisputed that the delay in trial due to Defendants' counsel filing of this 11th hour motion, as well as their actions allowing a jury to be impaneled, have resulted in increased and unnecessary costs of litigation for Plaintiff and this Honorable Court.[2] (Exhibit B, Affidavit of W. Mullins McLeod, Jr. as to costs and attorneys' fees). Of additional note, counsel for Defendants' ulterior and improper motives for filing their motion to disqualify Plaintiff's counsel also are apparent in the August 6, 2014 letter from J.R. Murphy, attorney for the South Carolina Municipal Insurance and Risk Financing Fund [SCMIRF], to Plaintiff's counsel and copied to

[2] In the Joint Response in Opposition to Plaintiff's Motion for Sanctions, the Defendants brazenly discount the judicial resources wasted by "calling attention to the fact" that it was actually Judge Gergel who conducted jury selection and "there were several other juries in other actions at the time jury in this case was selected." (ECF Entry No. 135 at 4).

Defendants' counsel in this case. (Exhibit C, August 6, 2014 Letter). Plaintiff's counsel extended a settlement offer to Defendants set to expire on August 6, 2014. As Mr. Murphy's letter explains, SCMIRF thereafter took the position that it could not engage in settlement discussions pending Defendants' motion to disqualify counsel, demonstrating the use of the motion as a further tactic of delay and harassment.

Despite this Court's rulings that Defendant Price lacked standing to file the motion and despite this Court's finding that there was no evidence that Plaintiff's Counsel or his former law firm ever represented the Town of Cottageville in the Modica case and that the Defendants, as a whole, did not "come close" to showing that "the drastic remedy of disqualification is appropriate," the harassment did not stop after the August 20, 2014 hearing. Instead, and alarmingly, Defense Counsel in the Opposition to Plaintiff's Motion for Sanctions cryptically advised the Court that "in compliance with Rule 8.3, Rules of Professional Conduct," they had filed all "essential documents" with the "appropriate agency" and that the "Supreme Court of South Carolina would ultimately be the final arbiter of whether the provided documents actually warrant attention". (ECF Entry No. 135, p. 3).

This conduct clearly demonstrates that Defendants' counsel has continued to improperly utilize the Rules of Professional Conduct as an adversarial tool that is prejudicial to the administration of justice in the above-captioned matter. The record also demonstrates Defense counsel is not the least bit contrite about his conduct in this case. Pursuant to SCACR 407, Rule 8.3(b) "a lawyer who **knows** that another lawyer has committed a violation of the Rules of Professional Conduct … shall inform the appropriate professional authority." (Emphasis added). No reasonable lawyer would report another lawyer after he knew full well there was no conflict of interest. Unless, however, that lawyer had an ulterior motive for reporting Mr. McLeod. The record in this case demonstrates the only reason Defendants' counsel reported Mr. McLeod was because his prior tactical move had backfired, and they feared they would be sanctioned by this Court.

Given that Plaintiff's counsel has now been reported to the Commission on Lawyer Conduct, Plaintiff's counsel contacted Professor John Freeman for advice and consultation. As most lawyers practicing law in South Carolina know, the Rules of Professional Conduct are of the utmost importance to Professor Freeman. He has spent most of his career working for the betterment of the legal profession through the education and enforcement of our Model Rules. Upon reviewing the relevant documents regarding Defendants' Motion to Disqualify and subsequent filing with the Commission on Lawyer Conduct, Professor Freeman felt compelled to respond to what he described as behavior "prejudicial to the administration of justice" under SCACR 407, Rule 8.4(e). (Exhibit A, Affidavit of John Freeman at para. 6). Moreover, Professor Freeman freely opined that by filing an "untimely and baseless disqualification motion on the eve of trial, counsel for defendants engaged in conduct that fell below the standard of care and was improper." Id. at para. 9.

The Fourth Circuit Court of Appeals has repeatedly ruled that under Rule 11, the primary purpose of sanctions against counsel is to "deter future litigation abuse." Hunter v. Earthgrains Co. Bakery, 281 F.3d 144 (4th Cir. 2002); see also In re Kunstler, 914 F.2d 505, 522 (4th Cir.1990). The Rules of Professional Conduct were designed and implemented to promote fair treatment of clients, lawyers, and our Courts. As stated in the Scope section of the Rules of Professional Conduct, SCACR 407, para. [7], "the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons." Moreover, as stated succinctly by Professor Freeman:

> Permitting lawyers to manipulate disclosure of alleged ethical violations can only encourage tactical maneuvers palpably subject to abuse. The Court's order pointed out that the consequence of defendants' tactical choice was to "unduly prejudice Reeves, who, but for the filing of this untimely and frivolous motion, would have already heard the jury's verdict in her case." [Order Filed August 26, 2014, at 6, Entry No. 129.] Attacking the other side's lawyers on ethical grounds is action that sometimes indisputably may need to be taken, but only when timely, and when the facts are clear and demand action. The Rules of Professional Conduct were designed and implemented to promote fair treatment of clients, lawyers, and our Courts. As stated in the Scope section of the Rules of Professional Conduct, SCACR 407, para. [7], "the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons." Unfortunately, subversion is what this record reflects.

(Exhibit A, Affidavit of John Freeman at para 6).

In conclusion, Plaintiff respectfully requests this Honorable Court impose sanctions against the Defendants. Defense counsel should be punished for "launching an 11th hour ethical attack" against Plaintiff's Counsel and disrupting the trial of this important case without evidentiary support for their factual contentions. Plaintiff respectfully requests that the Court award her the reasonable expenses incurred in bringing this motion, as well as the additional expenses and attorneys' fees that were unnecessarily incurred in impaneling a jury and preparing for the start of trial on August 11, 2014, which was delayed due to Defendants' frivolous motion, as well as the attorneys' fees incurred in responding in opposition to the frivolous motion. See Fed. R. Civ. P. 11(c)(2) & (4); and Exhibit B, Affidavit of W. Mullins McLeod, Jr. Plaintiff further requests that the Court reempanel the original jury for the October 1, 2014 trial, and impose any other sanctions it determines sufficient to deter repetition of Defendants' counsel's conduct by others similarly situated.

Respectfully submitted,

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/s/ W. Mullins McLeod, Jr.

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September 9, 2014
Charleston, South Carolina

CERTIFICATE OF SERVICE

I hereby certify that on this date, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to all CM/ECF participating attorneys, and I hereby certify that I have mailed the document to non CM/ECF participants.

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